STATE PERSONNEL BOARD, STATE OF COLORADO
Case No. 98B145

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

LARRY A. BROWN,

Complainant,

vs.

COLORADO DEPARTMENT OF PUBLIC SAFETY,
COLORADO BUREAU OF INVESTIGATION,

Respondent.

THIS MATTER came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on June 15, 1998. Respondent appeared through Peter Mang, the appointing authority, and was represented by Michael S. Williams, Assistant Attorney General. Complainant appeared and represented himself.

Respondent called the following witnesses: Agents Robert Brown, Mark Wilson and Robert Sexton (by telephone), and Peter Mang, Inspector-in-Charge of Investigative Support Services, Colorado Bureau of Investigation. Complainant testified in his own behalf and called: Agents Mark Wilson and Mike Chapla, and Inspector Peter Mang, Colorado Bureau of Investigation.

Respondent's Exhibits 1 through 7 were stipulated into evidence. Exhibit 8, a photograph of the subject storage locker, was admitted without objection. Complainant did not proffer any exhibits.

An order excluding the witnesses from the hearing room except when testifying was entered, excepting complainant and respondent's

advisory witness, Peter Mang.

MATTER APPEALED

Complainant appeals a two-week disciplinary suspension. For the reasons set forth below, the agency's action is upheld.

ISSUES

1. Whether complainant engaged in the acts for which discipline was imposed;

2. Whether the discipline imposed was within the range of alternatives available to the appointing authority;

3. Whether respondent's action was arbitrary, capricious or contrary to rule or law.

STIPULATIONS OF FACT[1]

1. Agents Brown (complainant) and Carscallen went to storage locker M-21 at the Chambers Mini-Storage in the late afternoon of March 17, 1998.

2. While there, Agents Brown and Carscallen used an optic device called a borescope.

[1] Stipulated facts are conclusive upon the parties and the tribunal. *Faught v. State*, 319 N.E. 2d 843, 846-47 (Ind. App. 1974).

3. Agent Brown inserted the borescope into a conduit.

FINDINGS OF FACT

1. Complainant, Larry A. Brown, has been employed in the capacity of Agent II specializing in technical surveilance for respondent, the Colorado Bureau of Investigation (CBI), for about two and one-half years. He previously served in the United States Air Force for 22 years and worked at the Air Force Office of Special Investigations (OSI) for thirteen years.

2. Complainant was familiar with the personnel at OSI and borrowed equipment from OSI for the use of CBI on more than one occasion.

3. In December 1997, the CBI joined in an investigation being carried out by the City of Black Hawk concerning credit card fraud. The Black Hawk Police Department had requested the assistance of CBI in determining the extent of the criminal activity in which certain individuals were suspected of obtaining credit cards by way of the U. S. Mail and fraudulently using the cards to acquire cash at the casinos. Also involved in various phases of this investigation were the United States Post Office and the City of Aurora.

4. The investigation was assigned to the Gaming Unit of CBI, of which complainant was not a member.

5. The credit card fraud suspects rented a 5' x 5' storage locker identified as locker M-22 in Aurora. The postal authorities then

rented the adjacent locker, M-21, later taken over by CBI, for the purpose of exterior surveillance of the suspects' locker.

6. The Aurora Police Department filed an affidavit in support of a search warrant for locker M-22 in Arapahoe County, but the warrant was denied for lack of probable cause. CBI Agent Mike Chapla was asked to write an affidavit for a warrant to search locker M-22, but he declined to do so because he did not have first-hand knowledge of facts that would support probable cause for the search.

7. A warrant to search locker M-22 was never issued. Complainant was aware that there was no warrant.

8. Complainant's supervisor, Agent-in-Charge Mark Wilson, had asked complainant to borrow long-range photographic equipment from OSI for use in a surveillance operation underway in Montrose, Colorado.

9. The OSI requires a written request before the loan of its equipment. Complainant prepared such a request referencing "Loan of Technical Investigative Equipment," and Wilson signed it with the understanding that he was authorizing only photographic equipment to be used in Montrose. (Exhibit 5.)

10. There is no written CBI policy requiring prior approval to borrow OSI equipment. It is Wilson's personal policy that all requests for equipment be approved by him. He testified that he would not have approved the requisition of a borescope to visually search the storage locker unless a search warrant had been signed by a judge and the search was authorized by CBI. At the time, he did not know what a borescope was.

11. On March 17, 1998, Agent Ron Carscallen accompanied complainant to OSI to pick up the photographic equipment. While there, they borrowed a borescope, a fiber optic device that would enable them to see into locker M-22 from M-21. A week prior, they had talked about using a borescope to find out if there was anything in locker M-22, and complainant wrongly assumed that Carscallen had received approval from the Gaming Unit to use the borescope. In fact, no one in CBI authorized what they were about to do because there was no search warrant. Carscallen did not have supervisory authority over complainant.

12. Complainant believed they were in a "gray area" with respect to whether their efforts to see into the suspects' locker would constitute an illegal search under the Fourth Amendment, but he did not seek guidance or counsel from anyone, including his supervisor, Wilson, who knew nothing about complainant's intentions.

13. After obtaining the borescope, the two agents went to the storage locker, where complainant used the borescope to see into locker M-22. He discovered a box inside the locker but could not identify the contents.

14. On April 10, 1998, a predisciplinary meeting was held between complainant and Peter Mang, the delegated appointing authority, regarding complainant's conduct of an illegal search in his capacity as a CBI Agent. Complainant at all times acknowledged that he obtained the borescope without the knowledge of his supervisor, that he used it to gain visual access to locker M-22, and that he knew that a request for a search warrant had been denied.

15. Mang concluded that complainant engaged in illegal activity

via a warrantless search without authorization and without seeking the guidance of his supervisor. To Mang, warrantless searches are inexcusable and are not to be tolerated. In addition to the potential suppression of illegally obtained evidence, Mang viewed complainant's conduct as highly serious because warrantless searches intrude on the civil rights of all citizens, who hold a constitutionally protected expectation of privacy, and CBI's reputation and credibility would be severely damaged if it were perceived by the public or other law enforcement agencies that CBI engaged in illegal searches.

16. In determining the appropriate discipline, Mang took into account that there had been another case of an illegal search by a CBI agent and that person received a 30-day suspension. Mang felt that the circumstances were mitigated with respect to complainant because of his forthrightness and cooperation, his overall high standard of job performance and his valued expertise.

17. Mang reasoned that complainant had violated CBI Policy 11 E 1, "Performance of Duty," when he conducted an illegal search, which may have jeopardized the integrity of the investigation as well as the credibility of the agency, and without coordinating his efforts with the Gaming Unit or his supervisor.

18. Mang found a violation of CBI Policy 11 E 2, "Incompetence," in complainant's failure to seek guidance from his supervisor when he was unsure of the legality of his search activities.

19. Mang decided that a two-week suspension would fairly and appropriately send the message to complainant and others that acts such as complainant's were extremely serious and could not be condoned by CBI.

20. By letter dated April 17, 1998, the appointing authority wrote to complainant:

> It is my decision that your actions constituted a violation of:
>
> 1. CBI Policy and Procedures 11 E 1, Performance of Duty, which states *"while on duty, employees shall be governed by the following rules:*
>
> *a. Employees shall devote their time and attention to the service of the state and Bureau and shall direct and coordinate their efforts in a manner which will establish and maintain the highest standard of efficiency.*
>
> 2. CBI Policy and Procedures 11 E 2, Incompetence, which states *"members may be deemed incompetent and subject to suspension, reduction in rank, or dismissal when they:*
>
> *act in a manner tending to bring discredit to themselves or to the Bureau, or*
>
> *fail to assume responsibility or exercise diligence, intelligence and interest in the pursuit of their duties."*
>
> 3. The violation(s) further constitute violation of:
>
> a. State of Colorado Personnel Rules, Code of Colorado Regulations, R8-3-3(c)(1),(2),(3) which provide for disciplinary actions up to and including termination for *"Failure to comply with standards of efficient service," "willful misconduct."*

(Exhibit 3.) (Underlining and italics in original.)

21. Along with the disciplinary action, the appointing authority issued a corrective action designed to enhance complainant's knowledge of the law of search and seizure and to increase the

level of communication with his supervisor. (Exhibit 3.)

22. Complainant Larry A. Brown filed a timely appeal on May 1, 1998.

DISCUSSION

In this *de novo* disciplinary proceeding, the burden is on the agency to prove by preponderant evidence that the acts or omissions on which the discipline was based occurred and that just cause warrants the discipline imposed. *Department of Institutions v. Kinchen*, 886 P.2d 700 (Colo. 1994). The State Personnel Board may reverse or modify respondent's action only if such action is found arbitrary, capricious or contrary to rule or law. § 24-50-103(6), C.R.S.

Respondent submits that complainant's unlawful search, his lack of due diligence in not seeking guidance when he believed he was in a "gray area" of the law and his failure to operate through his chain of command are sufficiently serious to warrant the discipline of a two-week suspicion.

Complainant asserts that he acted in good faith, *i.e.*, that he thought he was acting in the best interests of the agency, and that the discipline of a two-week suspension was overly harsh for the circumstances. He concedes that he made a mistake of judgment in relying on a fellow agent instead of his supervisor.

Complainant disputes some of the factual conclusions drawn by the appointing authority having to do with the technicalities of how the borescope was used and Mang's assertion that Agent Chapla was "in the process" of writing an affidavit for a search warrant, yet

these details had no bearing on the decision to impose discipline. The pertinent facts are undisputed: Complainant conducted an illegal search via a fiber optic device used to view the interior of locker M-22, without a warrant and without authorization, and he failed to consult with or inform his supervisor even though he believed that he was acting within a "gray area" of the law. Additionally, he knew that a warrant to search the premises had been denied.

The extreme seriousness of a law enforcement agency acting beyond the law and in violation of the state and federal constitutions is self-evident. *See, e.g.*, *People v. Wright*, 804 P.2d 866, 869 (Colo. 1991). A warrantless search is presumptively illegal. *People v. Alexander*, 561 P.2d 1263, 1265 (Colo. 1977). There were no exceptions to the warrant requirement in this case. *See, Id*.

It is the responsibility of the appointing authority to determine the appropriate course of action in a given situation. The evidence presented at hearing demonstrates that the appointing authority acted in a fair, reasonable and prudent manner in imposing a two-week suspension and a corrective action. He had a factual and legal basis for his action. There is no evidence of record from which to conclude that the appointing authority abused his discretion. There is substantial evidence to support his decision.

This administrative law judge is not persuaded that the judge is better suited to exercise the responsibilities of personnel management in this instance than is the appointing authority who disciplined this complainant. *See, Chiappe v. State Personnel Board*, 622 P.2d 527, 534 (Colo. 1981).

This is not a proper case for the award of attorney fees and costs under § 24-50-125.5, C.R.S., of the State Personnel System Act.

CONCLUSIONS OF LAW

1. Complainant committed the acts for which discipline was imposed.

2. The discipline imposed was within the realm of alternatives available to the appointing authority.

3. Respondent's action was not arbitrary, capricious or contrary to rule or law.

ORDER

Respondent's action is affirmed. Complainant's appeal is dismissed with prejudice.

DATED this _____ day of July, 1998, at Denver, Colorado.

_____
Robert W. Thompson, Jr.
Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of July, 1998, I placed true copies of the foregoing **INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE** in the United States mail, postage prepaid, addressed as follows:

Larry A. Brown
4072 South Lisbon Way
Aurora, CO 80013

and in the interagency mail, addressed as follows:

Michael S. Williams
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203

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